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# Remarks (as Panelist) on Europe 1992: Roundup on the Law and Politics of the European Community

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are other specialized Councils of Ministers in areas such as transport which are becoming GATT topics. It is possible that without changes these issues will also be dealt with more from a narrow parochial point of view than from a general Community perspective. In conclusion, in the 1980s the European Community has become a better GATT citizen, but as GATT expands into new areas (or tries to resolve old ones like agriculture), the European Community may find it difficult to participate effectively and meaningfully because of these institutional problems.

#### REMARKS BY CYNTHIA C. LICHTENSTEIN\*

Given our time constraints, I shall not describe here the content of the Delors Report or the facts of progress toward European Monetary Union (EMU). (For an excellent condensation of the Delors Report, including the proposed timetable for the achievement of monetary union, see Ungerer, "Europe, the Quest for Monetary Integration," 27 *Finance and Development* 14 (1990)). The Delors Report is the White Paper authorized by the EC Council of Ministers on what should be the Community goals for monetary union. Professor Davey has told you that the European Community is a customs union, that trade moves freely among member states. The Treaty of Rome, the Constitution of the EEC, however, did not provide for the European Community to be a monetary union. The Delors Report is only a study proposing the goals. No constitutional changes have as yet been made; just what should be the legal form of such changes is under discussion. Meetings that began in December are in effect a constitutional convention.

All one can say about progress toward EMU is that the European Community member states are now in the stage that the states of the world were in when they met in 1945 in San Francisco to consider moving toward a new system of world order. At present there exists a number of drafts of possible constitutive structures for a European central bank, which for the moment, because the Community is having trouble envisioning a single central organ, is being called the European *system* of central banks. That is the organ that is supposed to come into existence in stage two under the Delors Report, due in January 1994.

The heart of the matter is whether the member states will cede to Community institutions one of the ultimate bastions of state sovereignty—control over monetary policy. Rather than talk about the Delors Report, I will describe how the member states are now free to make their decisions in the monetary field, so that it is clear just what they will have to give up in order to get the benefits of monetary union.

Consider the situation of the United States under our Constitution. Our states have no right to create separate currencies or exercise exclusive control over resources that can act as currencies, such as gold or oil. When our union shifted from the Articles of Confederation to the Constitution, the federal Congress was granted the power to "coin Money, regulate the Value thereof, and of foreign Coin." At that point the thirteen states of the Confederation forwent their control over the money supply and over the rate of currency exchanges against currencies of other states.

At present, all twelve EC member states are what is called "Article 4" International Monetary Fund (IMF) members; this means that they have promised not to impose exchange restrictions upon current transactions. As anyone who has studied the Bretton Woods Agreement knows, that obligation is very much hedged.

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Utilizing the language of international trade, there are many "safeguard" clauses as to when—if a country views itself as being in difficulty—it can in fact impose exchange controls. What the Fund Agreement does achieve is to outlaw aggressive use of exchange controls and currency manipulations as a means of furthering a state's trade balance at the expense of other states. It does not forbid self-defense, however.

It is true that ten of the twelve member states participate in a system called the European Rate Mechanism (ERM) in which they hold exchange rates among their currencies within a certain range. But once again, there is no obligation in the Treaty of Rome or in the Single European Act for member states to join this system, and Britain only entered it this past year. Furthermore, because participants in the ERM may withdraw, they have not really given up sovereignty by participating in the system.

Article 4 of the Fund Agreement forbids exchange controls only on current transactions; what about a state's capacity to defend itself by exchange controls on "capital movements," "hot money" flows? As part of the creation of the single market, the European Community has, as of July 1990, completely liberalized capital movements. The member states have all said (through an EC Directive) that they will no longer restrict their citizens in moving capital funds any place they wish within (or indeed without) the Community. However, there is a "safeguard" clause in the capital movements Directive as well, and a state is exempted from its operation when it has problems controlling its monetary system because of flows. While there is agreement in the Community's Second Banking Directive for not restricting the entry of other member state banks and bank branches, once again the Directive includes an exception for monetary purposes.

In short, so far none of the states of the Community has given up any control over its monetary system. This is what will have to be negotiated to achieve monetary union. The States will have to agree on the powers of a central bank which will be able to lay down a common monetary policy. This is a far cry from promises to coordinate exchange rate movements. When a union's central organ determines its monetary policy, the value of the common currency and the rate at which that common currency will attempt to exchange against "foreign coin," then that union has truly gone from a "confederation" to a federal union.

The Community, if it wants to have monetary union, will have to impose upon its members a structure in which a system of central banks or one central bank (however that system is controlled by the political organs) has the power to determine the total quantity of money. If such a central bank mechanism with the power to determine the Community's total quantity of money could be set up, that would be an extraordinary relinquishment of sovereignty by the member states, because it means that they will have given up control over their own budgets.

The ultimate stage of monetary union will also mean a system of community review of state budgets. Different drafts of the proposed system of central banks do different things with this aspect. The Delors Report suggested creating general rules for member states' about their budget processes. The EC Commission is instead moving toward the system whereby the constitutional changes would include procedures by which limitations on member states' budget processes would be achieved. Now it is possible to understand why Mrs. Thatcher was resistant to the Delors Report. The British Prime Minister cannot always tell the Bank of England exactly what to do, but he or she can guide it fairly well. Mrs. Thatcher knew perfectly well that she would never be able to exercise that kind of power over a common central bank; when she wanted to take the UK into the Falklands

action, she would have had to figure out how to pay for it on Community terms. Mrs. Thatcher understood that she would be giving up control over her own money, and she said no. That is what the Community is considering: To what extent are those twelve states going to turn over to Community organs fundamental control over their own economies?

REMARKS BY CAROL F. LEE\*

My topic today is "European Political Union—An Emerging Constitution." This title, so it seems, is in keeping with the theme of this year's annual meeting: "Continuity and Change." In April 1978, the Society's annual meeting featured a panel on the subject of "The Emerging European Constitution." Now, thirteen years later, the twelve member states of the European Community are engaged in negotiations on something they call "political union." They hope to produce a new treaty by the end of this year. Assuming that they do, the treaty will be yet another step on the path to a true "European constitution."

What did the phrase, "the emerging European constitution," mean in 1978? The chairman of the panel, Professor Eric Stein, admitted that he had selected a "ringing title that might strike one as unrealistic and Pollyannaish, if not outright propagandistic in more than one sense." Yet he defended the use of these words, relying principally on the role that had been played in the Community's first two decades by the European Court of Justice.

The Court had interpreted the basic Community treaties, in particular the 1957 Treaty of Rome, in a constitutional mode. If it had employed traditional international law methodology, it would have focused on the specific intentions of the signatories and would have construed derogations of sovereignty narrowly. Instead the Court of Justice insisted that the EEC Treaty had created "its own legal system" whose rules were supreme over national laws, and even over national constitutions. It held that national courts were obliged to enforce the provisions of the Treaty, regardless of the status of treaty law in their own domestic legal orders. And the Court interpreted the Treaty in order to create an effective, workable structure of Community law.

So, when panelists spoke about an "emerging European constitution" in 1978, they were talking about judicial creativity. Today, the architects of the "emerging European Community constitution" are diplomats and foreign ministers rather than judges. It is beyond the capacity of even the most masterful of judges to restructure the processes by which European Community legislation is enacted, to create new institutions with legally binding authority, or to extend the Community's power to act into areas from which it is expressly excluded by treaty. To achieve these ends, treaty amendments are required. They must first be negotiated by the European Community's member states and then ratified by the parliaments of all the member states. That is the process that is generating the next stage in the European Community's constitutional development.

The term "political union" may conjure up visions of a federated European state with its own government and its own legislature, whose citizens are bound together by a sense of common political allegiance. But, in European governmental circles, "political union" actually means far less than that. It is a convenient shorthand for an assortment of institutional reform proposals that would strengthen the Community in areas other than economic and monetary union.

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